IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 4260 of 2001

For Approval and Signature:

Hon'ble MR.JUSTICE P.B.MAJMUDAR

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1. Whether Reporters of Local Papers may be allowed to see the judgement? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

SARDAR PATEL UNIVERSITY

Versus

HARIKRISHNA CHANDULAL TRIVEDI

Appearance:

Mr.S.N. Shelat, Advocate General, with

MR MITUL K SHELAT for Petitioner.

MR HJ NANAVATI for Respondent No. 1

RULE SERVED BY DS for Respondent No. 2

CORAM : MR.JUSTICE P.B.MAJMUDAR

Date of decision: 05/07/2001

ORAL JUDGEMENT

1. Whether a Professor (respondent No.1 herein), who is appointed on the post of the Head of the Department of the petitioner-University, is entitled to continue even after the tenure of such appointment is over, is the

question which is required to be considered in this Special Civil Application.

2. In the petitioner-University, there is a post of "Head of University Department" and such Head of the Department can be appointed by the Syndicate from amongst a person, who is a Professor, or failing him, a Reader, in any of the subjects comprised in the Department. Chapter XII of the Statutes deals with the Heads of University Departments. The relevant provisions are Sections 112A to 112D and the same are reproduced as under :-

> " ... ...
>
> 112A. Every University department shall be designated as such with reference to a subject or group of subjects taught therein by the Syndicate under Ordinances.
>
> 112B. The Head of very department designated as such under Statute 112 A shall be appointed by the Syndicate. He shall be a Professor or failing him a Reader in any of the subjects comprised in the department; provided that any person appointed as Honorary Professor or Reader in any of the subjects comprised in the department may be appointed by the Syndicate as the Head of the particular department.
>
> 112C. The Head of the department shall be principally responsible for instruction, training and research in the department of which he is appointed the Head.
>
> 112D. A person appointed as the Head of a Department shall cease to hold office on his resignation, death or on appointment of another Head by the Syndicate or his ceasing to be designated as a University Professor or Reader.
>
> ... ..."

By an order dated 22.5.1996, Respondent No.1 was appointed as Head of the Department of Chemistry with effect from 23rd May, 1996 for a period of five years, i.e. upto 22nd May, 2001 or till he work as the Head of the Department, whichever is earlier. The aforesaid appointment order is produced at page 136 in the compilation. The respondent No.1, who was at the relevant time discharging his duties as Professor in Chemistry Department was accordingly designated as the Head of the Department considering his seniority, as he was the senior-most Professor in the Chemistry Department at the relevant time. It is not in dispute that under the provisions of the University Act, the Syndicate was the competent body to appoint such Head of the Department in the University in a particular Department. As per the said appointment order, therefore, the term of the respondent No.1 was to come to an end on 22nd May, 2001. It is also required to be noted that the respondent No.1 was appointed as Professor by way of direct selection in the Chemistry Department and subsequently, as stated earlier, he was appointed as the Head of the Department for a period of five years. There was some controversy between the respondent No.1 and the University in the year 1997, as, even though the respondent No.1, who was the original applicant before the Tribunal, was appointed for a period of five years, he was sought to be removed in February, 1997 and one Dr.J.R.Shah was appointed in his place. The said action of removing him as the Head of the Department was challenged by the present opponent before the Tribunal by way of Application No.4 of 1997.

The contention of the present respondent No.1 at that time was that Dr.J.R. Shah could not have been appointed as the Head of the Department as he was an ex cadre employee and in view of the judgment of the Honourable Supreme Court in Dr.Rashmi Srivastava v. Vikram University, AIR 1995 SC 1694, he could not have been appointed as he is not in the cadre post and unless there is an amendment in the Act, empowering the University to include such ex cadre posts, Dr.J.R.Shah had no right to be appointed as the Head of the Department. Said Application was allowed by the Tribunal by its order dated 10th March, 1998 and accordingly, the present respondent No.1 was continued as Head of the Department. Thereafter, since the tenure of the respondent No.1 was coming to an end, he again approached the Tribunal. It was contended on behalf of the respondent No.1 in the said application that so far as the appointment of the Head of the Department is concerned, it is not open for the Syndicate to prescribe any tenure of such appointment and that it is not open

for the Syndicate to opt for rotation system for appointment to the said post and it is not open for the Syndicate to include ex cadre Professors in the matter of fixing seniority along with the directly recruited persons for appointment to the post of Head of the Department, and that the Syndicate had no right to pass Ordinance 95-A, as there are no such powers available to the Syndicate to pass such Resolution.

At this juncture, reference is required to be made to the Resolution of the Syndicate dated 29.6.1991, which is at Annexure `A' page 16 of the compilation. By the said Resolution, it has been provided that in the Department of the University, where there are more than one Professor, the post of Head of the Department may be rotated, i.e. if a concerned Professor has completed five years as the Head of the Department, after the said period, another Professor should be given the designation of the Head of the Department for a term of five years. Accordingly, by the said Resolution the tenure was prescribed for the post of the Head of the Department for five years each and on the basis of seniority, a Professor is to be appointed for a period of five years as the Head of the Department. The aforesaid Resolution was passed in 1991 and it seems that because of the said Resolution, the respondent No.1 was given appointment for five years in the year 1996 as per the Notification dated 22.5.1996. Accordingly, before the respondent No.1 was appointed as the Head of the Department, there was already a tenure appointment in the University since 1991 and the rotation procedure was also introduced long back before the respondent No.1 was appointed as the Head of the Department. Since the tenure of the respondent No.1 was coming to an end, he again approached the Tribunal with the application, as stated earlier, and as per his averment in the application, it was not open for the Syndicate to prescribe any tenure and under the provisions of the statute, service condition of an Officer of the University can be prescribed only by the Senate and not by the Syndicate as the Syndicate is only an Executive Authority. It was the case of the respondent No.1 before the Tribunal that there is no provision under the Act, whereby the post of the Head of the Department is to be filled in by way of rotation and by prescribing tenure upto five yeas and that, therefore, the said Resolution of the Syndicate dated 29.6.1991 was ultra vires the provisions of the statute.

3. The other grievance was including ex cadre employee for the purpose of selection as Head of the

Department on the ground that in view of the Supreme Court judgment, as referred above, this ex cadre employee could not have been clubbed together for the purpose of consideration for appointment on the post of Head of the Department unless there is a proper amendment in the Act. According to the respondent, instead of amending the statute, the Syndicate passed a Resolution, whereby Clause 26 was inserted in Ordinance 95-A, whereby the Professors under Merit Promotion Scheme or Career Advancement Scheme and directly recruited Professors came to be placed in equal footing so far as the seniority is concerned. The said Notification is also placed on record in the Compilation as Annexure `G'. The present respondent, therefore, approached the Tribunal on the aforesaid grounds, viz., that the Syndicate has no right to prescribe rotation procedure and also to prescribe tenure for appointment to the post of Head of the Department as well as considering the ex cadre employees as Professors under the Merit Promotion Scheme or Career Advancement Scheme after clubbing them with the directly recruited professors considering them equal in the matter of seniority. The respondent No.1 had also prayed for interim relief to the effect that he should be allowed to be continued on the post of the Head of the Department, by restraining the University from removing the respondent No.1-original applicant as the Head of the Chemistry Department.

The Tribunal had granted ad interim relief which was prayed for and, thereafter, after hearing both the sides, allowed the aforesaid Application No.9 of 2001. The Tribunal came to the conclusion that in the earlier proceedings of this very applicant, the Tribunal had decided the point about the inclusion of ex cadre Professors in the matter of fixing seniority along with directly recruited persons. The Tribunal came to the conclusion that by passing Resolution, it was not open for the Syndicate to disobey the earlier directions given by the Tribunal as well as the Syndicate could not have acted contrary to the Supreme Court judgment unless the statute was properly amended. The Tribunal also further came to the conclusion that it was not open for the Syndicate to prescribe any rotation procedure and the Syndicate could not have prescribed any tenure so far as the appointment to the post of Head of the Department is concerned. The Tribunal, ultimately, allowed the said application, with certain observations in the order and having been aggrieved by the said order of the Tribunal, the University has preferred this Special Civil Application, challenging the aforesaid order of the Tribunal.

4. Mr.S.N. Shelat, Advocate General, with Mr.Mitul Shelat, appeared for the petitioner-University and Mr.H.J. Nanavati appeared for respondent No.1, who was the original applicant before the Tribunal.

5. Mr.Shelat has firstly argued that the Tribunal has committed an apparent error in coming to the conclusion that the Syndicate has no power to prescribe tenure for the post of Head of the Department. Mr.Shelat submitted that the Syndicate is the appointing authority under Section 112 of the Act. Mr.Shelat also further submitted that considering the provisions of Section 112D of the Act, a Head of the Department can be replaced by appointment of another Head of the Department and, therefore, he can hold the office till appointment of another Head of the Department by the Syndicate. For that purpose, he has relied upon Section 112D.

Mr.Shelat also further submitted that in order to see that there may not be any heartburning among the Professors, if there is more than one Professor in a particular Department and in order to see that each and every Processor gets a chance to become Head of the Department, the Syndicate has prescribed procedure of rotation, wherein the Head of the Department on the basis of seniority can continue to be the Head of the Department for a period of five years and on completion of the aforesaid period of five years, the next senior-most Professor can be appointed as the Head of the Department. Mr.Shelat also argued that the powers to appoint Head of the Department vests with the Syndicate and as an appointing authority, it is open to the Syndicate to prescribe the tenure of such appointment also. He submitted that so far as the statute is concerned, the same is silent about the tenure of such Head of the Department. He further submitted that the said Resolution is as back as of 1991 and that the respondent No.1 himself was the beneficiary of the said Resolution in 1996 and he got his appointment for a period of five years and that he has challenged the said Resolution of 1991 at the time when his tenure was to come to an end. He further submitted that, in any case, the respondent No.1 has no right to continue after the tenure of his appointment which came to an end in May, 2001 and, therafter, he has no right whatsoever to continue as the Head of the Department. He, therefore, submitted that the Tribunal has committed grave error of law in interpreting the provisions of the Statute of the University, which has resulted in miscarriage of justice.

So far as Ordinance 95-A, by which the seniority of ex cadre employee is also taken into consideration, he submitted that so far as the post of the Head of the Department is concerned, the appointment shall be made only from a cadre post and that the Resolution will not be given any effect to so far as the ex cadre post employees are concerned and accordingly, no effect will be given to the said Resolution of the Syndicate so far as the appointment to the post of Head of the Department is concerned. In view of the aforesaid clear-cut statement of Mr.Shelat, the grievance of the respondent No.1 so far as inclusion of ex cadre employee in the seniority list for the purpose of appointment to the post of Head of the Department is concerned, no longer survives. Therefore, the only question which is required to be considered in this petition is whether the Syndicate was justified in the year 1991 to prescribe tenure of appointment so far as the appointment to the post of Head of the Department is concerned as well as whether the Syndicate was justified in applying rotation system for such appointment.

6. Mr.H.J. Nanavati, learned Advocate for respondent No.1, vehemently argued that under the provisions of the Sardar Patel University Act, no powers are delegated to the Syndicate to prescribe any tenure appointment to the post of the Head of the Department and even otherwise, when the statute is silent, the Syndicate cannot prescribe anything by adding any provision by way of Resolution unless there is a specific amendment in the statute itself. He further submitted that the Syndicate is having only Executive Powers and it is not open for them to get any new powers which are not available to them. For that purpose, he has relied upon certain provisions of the Sardar Patel University Act.

7. Mr.Nanavati submitted that so far as the Heads of University Departments are concerned, such Heads are the Officers of the University. For that purpose, he has relied upon bracketed portion under the heading of "Heads of University Departments". In the bracketed portion, a reference is made to provisions under Sections 8(v) and 23(1)(xx) of the Act. So far as Section 8 of the Act is concerned, it reads as under :-

> " ... ...
>
> 8. The following shall be the officers of the University, namely :-
>
> (i) the Chancellor,

(ii) the Vice-Chancellor,
(iia) the Pro-Vice-Chancellor,
(iii) the Deans of Faculties,
(iv) the Registrar, and
(v) such other officers in the service of the University as may be declared by the Statutes to be officers of the University.

... ..."

It was submitted by Mr.Nanavaty that the Head of the Department, therefore, is an `Officer' of the University under Section 8(v) of the Act and, therefore, it is only the Senate which can prescribe the service conditions of the Officers of the University and the Syndicate is not empowered to prescribe any Service Conditions in this behalf. Mr.Nanavati has also relied upon Section 41(e) of the Act. The relevant part of Section 41 provides as under :-

" ... ...

41. Subject to the provisions of this Act, the Senate may, from time to time, make Statutes for all or any of the following matters, namely :-

xxx xxx xxx

(e) the conditions of service of the Registrar and the officers and servants of the University;

... ..."

It was argued by Mr.Nanavati that by virtue of the aforesaid provision, it is only the Senate, which can make rules and necessary provision regarding conditions of service of the Officers of the University and since the Head of the Department is an `Officer' of the University, the Syndicate has no right to provide any service condition or regulate any service condition by providing tenure of service or evolve a rotation system, unless there is a specific amendment in the Act, giving such powers to the Syndicate. He also argued that in some of the Universities, like M.S.University, Baroda, the statute itself provides tenure of the Head of the Department and the Syndicate is not given such powers especially when there is no express provision in the Act, giving such powers also to the Syndicate. He, therefore,

submitted that the Resolution of 1991 is dehors the provisions of the Act and it was not open for the Syndicate to prescribe either rotation or tenure in so far as appointment as Head of the Department so far as the University departments are concerned. He also further submitted that certain rights and privileges are conferred upon the Head of the Department and, therefore, if any change is required to be made, it would amount to effecting change in the service conditions and it is not open for the Syndicate to effect such change in the service Condition. Mr.Nanavati also further relied upon Section 43(1)(l) of the Act, by which the Syndicate is authorized to frame Ordinances regarding certain matters. Section 43(1)(l) reads as under :-

> " ... ...
>
> 43. (1) Subject to the provisions of this Act and the Statutes, the Syndicate may frame Ordinances to provide for all or any of the following matters, namely :-
>
> xxx xxx xxx
>
> (l) the powers and duties of the Registrar and other officers and servants of the University;
>
> ... ..."

He also further submitted that the Syndicate can, at the most, frame Ordinance prescribing powers and duties of the Head of the Department and nothing more. He also further submitted that even though it may be true that, in the past, after 1991 Resolution, Head of the Department might have been appointed on tenure basis, such precedent would not come in the way of the respondent No.1 as no precedent can have the effect contrary to statutory provisions. It was, therefore, submitted that even though the Syndicate is the Appointing Authority under the provisions of Section 112D, the Syndicate except appointing such persons, has no further right to prescribe any tenure for such appointment. It was, therefore, submitted that in view of the aforesaid submissions, the order of the Tribunal

is required to be maintained.

8. I have considered the arguments of both the sides in detail. So far as the question whether such Head of the Department can be considered as an `Officer' or not, Mr.Shelat argued that there is no specific declaration under Section 8(v), by which the Heads of the Department are considered as `Officers' of the University. He submitted that the University has to declare by the statute the particular category to which the Officers of the University belong and, there is no such declaration. However, in view of the fact that there is a mention of Rule 8(v) under the heading, "Heads of University Departments" in Chapter XII, in my view, it can be presumed that Head of the Department can be construed as an `Officer' of the University by virtue of Clause 8(v) of the Act. However, the question which still requires consideration is whether it is open for the Syndicate to prescribe rotation procedure and prescribe tenure of appointment of the Head of the Department in the University. It is not in dispute that the Syndicate is the Appointing Authority so far as the Head of the Department is concerned. The respondent No.1 himself got the benefit of appointment at the hands of the Syndicate in the year 1996 and at that time, he very well knew that his appointment is a tenure appointment of five years by virtue of the Resolution of 1991. At that time, without making any grievance, the respondent No.1 has accepted his appointment and when the time of his tenure was coming to an end, he went to the Tribunal, complaining about the said Resolution of 1991 that the Syndicate had no right to pass such a Resolution. It is required to be borne in mind that the Syndicate is the Appointing Authority under Section 112B of the Act and in my view, the appointing authority has all the rights to prescribe even the tenure of appointment and such right can always be implied with the Appointing Authority. In this behalf, reference is required to be made to the judgment of the Apex Court in M/s. Heckett Engineering Co. v. Their Workmen, AIR 1977 SC 2257, of which reference was made by Mr.Shelat. It has been held by the Supreme Court in paragraph 14 as under :-

> " ... ...
>
> It is now firmly established that the power to terminate service is a necessary adjunct of the power of appointment and is exercised as an incident to or consequence of that power.

... ..."

The powers of the Syndicate, being an appointing authority, cannot be curtailed in any manner, because the appointing authority has all the powers to restrict the tenure of employment at the time of giving appointment order. It is required to be noted that so far as the statute is concerned, it is silent so far as tenure of such Head of the Department is concerned and the powers for appointment, as stated earlier, is given to the Syndicate by virtue of Section 112B of the Act. In that view of the matter, when the statute is silent in this behalf, it is always open for the appointing authority to prescribe a tenure and the respondent No.1 having accepted such tenure appointment and having completed his tenure term on that basis, now cannot make any grievance in this behalf.

9. It is required to be noted that even otherwise, if there is no provision in the statute, then, in absence of such provision in the statute itself, it is open for the University to follow the precedent. In the instant case, it is not in dispute that even before the appointment of the respondent No.1 on the said post, such appointments were governed by way of tenure appointment and by way of adopting rotation procedure. The respondent No.1 having taken advantage at the time of his appointment, very well knew that he is getting such tenure appointment by virtue of the 1991 Resolution, and therafter, he cannot make any grievance after a period of 10 years that the said Resolution of 1991 is bad. Reference is also required to be made at this stage to the judgment of a learned single Judge of this Court in Todarmal Jiva Jadav v. Kandla Port Trust & Anr., XXXII (2) : 1991(2) GLR 1295. It has been held in paragraph 10 of the said decision as under :-

" ... ...

It may be mentioned at this stage that there are no administrative or executive instructions in force governing the question of appointment inter alia to the post of Chief Engineer. It is well settled that in the absence of any statutory rule governing the question of appointment to Chief Engineer's post administrative or executive instructions, if any, would hold the field. If there are no such administrative or executive instructions, the policy adopted by the concerned

> authority should furnish the guiding principles regarding the criterion or criteria to be followed for filing up such post. It is difficult to agree with the submission urged on behalf of the respondents to the effect that there was no declared policy on the part of the respondents for filling up such vacancies as that of Chief Engineer. As pointed out hereinabove, in past the post of Chief Engineer was filled by appointment of the senior most Superintending Engineer, named, Sri D'mello and thereafter by appointment of then senior most Superintending Engineer, named, Shri Asnani presumably when Shri D'mello retired. It is difficult to accept the submission urged before me on behalf of the respondents to the effect that two past instances would not constitute a policy on the part of the respondents laying down any criterion or criteria for filling the post of Chief Engineer. In absence of any rule or administrative or executive instructions, the manner and method of filling up such vacancies as and when arising would show the policy adopted by the concerned authorities for the purpose. Even at the cost of repetition, it has to be reiterated that the policy to fill up the post of Chief Engineer on the establishment of respondent No.1 was by appointment of the senior most Superintending Engineer. In other words, it was filled up by promotion.
>
> ... ..."

In my view, therefore, when there is no provision in the Act prescribing any time limit, it is always open for the appointing authority to prescribe tenure of such appointment and even to regulate such future appointment. I also find considerable force in the argument of Mr.Shelat that the aforesaid Resolution of 1991 is passed with an object to see that there may not be any discrimination amongst the employees.

10. "Head of the Department" in substance is a designation given to the senior-most Professor and he is given some additional function and on completion of his tenure, he can continue on his substantive post as Professor / Reader, as the case may be. Once a person

accepts tenure appointment, he cannot claim any further right moment such tenure period is over. In my view, therefore, it is not open for the respondent No.1 to contend that even after completion of five years, he is entitled to continue till superannuation. Having accepted the appointment, he is supposed to make room for others who are in queue awaiting their turn for such appointment.

11. It is also required to be noted that under Section 112D, the appointment of the Head of the Department can continue till appointment of another Head of the Department. That itself shows that even as per the provisions of Section 112D itself, on appointment of another Head of the Department, a person holding the post of Head of the Department, is required to vacate his post. So, as an Appointing Authority, it is always open for the Syndicate to appoint another Head of the Department in place of the existing Head of the Department. Even reading Section 112D also, it is clear that there is no right available in favour of the Head of the Department to continue till superannuation and moment another Head of the Department is appointed, he ceases to hold such office. In that view also, it is open for the Syndicate to appoint another Head of the Department in place of the existing Head of the Department. However, in order to see that there may not be any allegation of mala fides or arbitrariness, if a Resolution is passed by the Syndicate prescribing tenure of five years and prescribing rotation procedure, in my view, there is nothing wrong in the same. It cannot be said that the said Resolution of 1991 providing for rotation procedure and for tenure is in any way in conflict with the statute or that it is passed contrary to the provisions of the Statute. One has to remember that the statute has given appointment powers to the Syndicate and, therefore, it is open for the Syndicate to prescribe the tenure as well as give appointment in the manner in which it thinks fit, including the power to regulate such appointment. The Tribunal could not have converted such appointment into a permanent appointment.

The Tribunal has failed to consider the aforesaid aspect and has accordingly committed an error of law, which is required to be corrected by this Court in a petition under Article 227 of the Constitution of India.

12. Mr.Nanavati lastly relied upon the provisions of Section 23(1)(xx), which provides as under :-

" ... ...

> 23. (1) Subject to such conditions as may be prescribed by or under the provisions of this Act, the Syndicate shall have the following powers and perform the following duties, namely :-
>
> xxx xxx xxx
>
> (xx) to appoint Heads of University Departments in accordance with Statutes;
>
> ... ..."

He submitted that the Syndicate is having power to appoint Head of the University Department in accordance with the Statutes and not dehors the statute. In view of what is stated above, in my view, the Syndicate has acted in accordance with the statute in prescribing the tenure to the post of the Head of the Department. In that view of the matter, the order of the Tribunal in so far as the Resolution of 1991 is concerned is required to be set aside.

13. As Mr.Shelat has fairly stated that the ex cadre post will not be taken into consideration so far as the appointment to the post of Head of Department is concerned, it is not necessary to examine the aforesaid question about Ordinance 95-A. It is needless to say that the University will have to amend the statute in case ex cadre post is required to be included in the seniority list for the purpose of appointment to the post of Head of the Department. However, the Tribunal has failed to consider the fact that so far as the respondent No.1 is concerned, after his tenure, he had no right to continue on the post in question. The order of the Tribunal, therefore, is required to be set aside in so far as it has allowed the application of the respondent No.1, by which he is permitted to continue on the post of Head of the Department even after 22nd May, 2001.

14. In view of what is stated above, it is declared that the respondent No.1 has no right to continue on the post of the Head of the Department after 22nd May, 2001. The petition is accordingly allowed and consequently, the application of respondent No.1 before the Tribunal is ordered to be dismissed. Rule is made absolute to the aforesaid extent with no order as to costs.

Mr.Nanavati at this stage requested that the implementation of this order may be stayed for some time as his client would like to prefer Letters Patent Appeal against this order. In the facts and circumstances of the case, implementation of this order is stayed upto 20th July, 2001.

5th July, 2001 (P.B. Majmudar, J.)

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(apj)